No. 8425

In the United States
Circuit Court of Appeals
For the Ninth Circuit

In the Matter of
JAMES MARTIN KIRKPATRICK,
Debtor.

E. H. HARDT,
Appellant,

vs.

JAMES MARTIN KIRKPATRICK,
Appellee.

Appellant's Reply Brief

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A. ADMISSIONS IN APPELLEE'S BRIEF

Upon no point does Appellee quarrel with the "Statement of Facts" in Appellant's Opening Brief, except this:

Pages 4 and 6 of Appellant's Opening Brief refer to the fact that Appellee was the moving party seeking an injunction in the court below, and made no proof of the date when Appellant's trust deed foreclosure proceedings

started. From this Appellant argued (p. 6 of the Opening Brief) that there being a defect in the proof upon the part of the moving party who bore the burden of proof, the District Court was bound to assume the foreclosure was started before bankruptcy. Appellee's Brief (p. 1) admits the lack of proof but contends that, since he proved nothing, the assumption must be made that the steps precedent to trustee's sale occurred after bankruptcy. If this be so, a plaintiff's case is completely established by proving nothing, and silence is indeed golden.

However that may be, Appellee does not deny that, in fact, sale proceedings antedated bankruptcy; and whether they did or not probably makes no difference, for the language of the Heffron decision and of nearly all other cases permitting sales after the intervention of bankruptcy makes no reference to the time of starting proceedings for sale.

In all other respects Appellant's "Statement of the Case" is undenied, and Appellee specifically concedes that *"in this case the market value was paid for the property"* (Appellee's Brief, p. 5).

Section C, subdivision I of Appellant's Opening Brief ("No Legislative Prohibition of Sale Exists") refers to the fact that while subsection "(o)" of section 75 of the Bankruptcy Act (by its terms and without any order of court) prohibits certain sales under deeds of trust, that subsection ceases to function as soon as a farmer amends his petition to proceed under section 75 (s) of the Act. Appellee's Brief does not attempt to deny the inapplicability of subsection "(o)" and its prohibitions to proceedings under subsection "(s)".

Therefore, that point may be taken as conceded, and there is no need to consider it further. Appellee's references to the effect of subsection "(o)" before amendment of the farmer's petition (p. 3 of his brief) are beside the point, when we consider that Appellee amended his petition to request the benefits of subsection "(s)" prior to the sale here in question ("Statement of the Case" in Appellant's Opening Brief, page 5, subdivisions '(h)' to '(k)'; Transcript, pages 17, 18 and 25).

B. DISCUSSION OF APPELLEE'S CONTENTION

Before arguing the validity of Appellee's sole contention it is well to state what that contention is; and this can be done no more aptly than by quoting Appellee's own words:

> "Appellee's contention is that a sale of encumbered property in the exclusive possession of the bankruptcy court and in possession of the bankrupt at the time of adjudication cannot be made without the court's consent after adjudication."
>
> (Appellee's Brief, p. 2.)

I. The Practical Effect of Allowing Sales Unless Restrained.

Appellee contends that to recognize validity in sales not restrained, but made after adjudication under section 75 (s), "would amount to a nullification of the essential purpose of the act and amount to closing the barn door after the horse was stolen."

On the contrary, sales which do not realize the full value of the property can be set aside by the Court (Heffron v. Western Loan and Building Co., 84 Fed. (2d) 301), or if the circumstances warrant it, the Court can specifically en-

join sales under deeds of trust (Heffron v. Western Loan and Building Co., page 303). At most, the rule stated in the Heffron decision, which Appellee contends to be ruinous, merely places the burden on the debtor of restraining a sale, instead of imposing upon the creditor the onus of procuring a precedent order allowing it.

II. The Authorities Cited by Appellee.

Appellee displays more temerity than we should care to, when (upon pages 5-6 of the "Appellee's Brief") he seeks to convince this Court that it did not mean what it said in ruling that:

> "In the absence of factors requiring interference, a court of bankruptcy will not disturb the foreclosure of a lien by non-judicial action when such foreclosure is in accord with the agreement of the lienor and the lienee."
>
> (Heffron v. Western Loan and Building Company, 84 Fed. (2d) 301, at 303.)

He says the Heffron case "is not in point as sale there was prior to adjudication." But Appellee fails to recognize the essence of the Heffron case, which is that the existence of jurisdiction in the Bankruptcy Court does not of itself prevent a private sale, but merely permits the Court to enjoin *if it wishes to do so.* That being the theory of the Heffron case, it matters not whether jurisdiction attached upon adjudication, or earlier.

In the course of the Heffron opinion (page 304) it appears that the appellant trustee therein claimed the decisions of Robinson v. Kay, 7 Fed. (2d) 576, 578, and Hiscock v. Varick Bank, 206 U. S. 28, 27 Supr. Ct. 681, 51

L. Ed. 945, (which held to be valid private sales made after bankruptcy started) were "overruled by Isaacs v. Hobbs Tie and Timber Co., 282 U. S. 734, 738, 51 S. Ct. 270, 75 L. Ed. 645" just as Appellee claims here. This contention was quickly disposed of in the Heffron case, wherein this Court said (page 304):

> "The facts of the Isaacs case are so different from those before us that it is obvious without discussion that the holding there does not overrule the Hiscock and Robinson cases. . . .
>
> The later case of Straton v. New, 283 U. S. 318, 321, 323, 51 S. Ct. 465, 75 L. Ed. 260, is a refutation of the notion that any proceeding in foreclosure of a lien had otherwise than under the aegis of the court of bankruptcy and after the beginning of bankruptcy proceedings is, merely because of those circumstances, void."

And so fades the Isaacs decision. Clearly it related to jurisdiction of two different courts over a judicial foreclosure, and in no wise to a private sale under a deed of trust.

With the case cited by Appellee upon page 6 of his brief (re Taubel, Scott, Kitzmiller Co. v. Fox, 69 L. Ed. 770), to the effect that property is within the jurisdiction of the Court if it was in the possession of the debtor at he time he filed his petition, we have no quarrel. Here, again, Appellee fails to distinguish between the existence of jurisdiction and the necessity of exercising it.

Dayton v. Stanard (60 L. Ed. 1191—cited by Appellee on page 7 of his brief), declaring invalid a sale for taxes and special assessments, apparently related to taxes and assessments which were not a lien at the time bankruptcy

proceedings were commenced. This is apparent from the fact that the opinion cites and relies on Wiswall v. Sampson (14 How. 52, 14 L. Ed. 322), which in turn simply decides that a sale is invalid when founded upon an execution levied during the time property was in *custodia legis*.

The Dayton opinion makes no distinction between sales before and after adjudication, and relates solely to sales *in invitum* under tax and assessment proceedings. No doubt the class of cases it represents was considered and found inapplicable when the Heffron decision was formulated.

Cohen v. Nixon & Wright (236 Fed. 406—alluded to upon page 8 of Appellee's Brief), is mentioned and distinguished upon page 18 of our Opening Brief. It is likewise referred to in the Heffron opinion, which reaches a result contrary to the one Appellee claims should follow from the Cohen case. As noted in the Opening Brief, *the Cohen case confirmed a sale made without permission, in the event a resale there ordered proved the original sale price to be adequate.*

Appellee seeks to create a distinction between sales before adjudication and those after, saying that the trustee's title (in ordinary bankruptcy) vests only upon adjudication, although the title acquired (except as against innocent purchasers) is that existing at the time the petition was filed.

If this be so, he is hoist on his own petard; for, under his contention, title passes to the trustee upon adjudication; and upon page 12 of his brief he quotes this from the Heffron opinion (supra):

"Manifestly the mere fact that the bankrupt's prop-

> erty comes into custodia legis *or passes to the trustee*, does not ipso factor void a *subsequent* foreclosure of a lien against the property."

which is an express statement that *adjudication does not of itself prevent a later sale from being valid.*

The language quoted upon pages 13 to 14 of Appellee's Brief, and attributed to the case of In re Cope (8 Fed. Supp. 777) *is definitely not present in that opinion.* We do not know what, if any, authority the quotation carries, and for that reason it cannot be deemed worthy of consideration.

It is respectfully submitted that nothing in Appellee's Brief detracts in any way from the Heffron v. Western Loan and Building Co. ruling that a private sale during bankruptcy under a valid trust deed is effective unless accompanied by fraud or inadequacy of price, or unless prohibited by an antecedent order of Court.

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